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## Nature and Scope of Museum Exhibitions

A museum is defined as "any permanent institution which conserves and displays, for purposes of study, education and enjoyment, collections of objects of cultural or scientific significance."[1] This definition includes: "(a) exhibition galleries permanently maintained by public libraries and collections of archives; (b) historical monuments and parts of historical monuments or their dependencies, such as cathedral treasuries, historical, archaeological and natural sites, which are officially open to the public; (c) botanical and zoological gardens, aquaria, vivaria, and other institutions which display living specimens; (d) natural reserves."[2] The operative words in the definition are *conserves* and *displays*. The conservation process may range from the massive accumulation of artifacts, by the millions in the case of the Smithsonian Institution, to the relatively small, specialized collection in a local art museum. The display function is manifested by exhibitions of objects drawn from a museum's permanent collection or borrowed objects forming part of a temporary collection. Objects on display may be owned outright by a museum, may be the subject of a fractional ownership interest, or may be borrowed for periods of time ranging from a few days to many decades.

The collections of many museums are too large for display en masse at any one time. Often the larger portion is stored in facilities either on or off the premises, with selections from the collection on semi-permanent display. Most of the works observed by the public form part of the museum's permanent collection. In addition to these displays, special exhibitions are presented periodically based upon the

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1. INTERNATIONAL COUNCIL OF MUSEUMS, STATUTES § 2, art. 3 (1969).
2. *Id.* art. 4.

work of a particular artist, the development of a special theme, or the presentation of a particular culture, period, or discovery. Few museums own all of the works which curators would consider essential for a comprehensive presentation in the form of a special exhibition. Most of the objects of museological interest are scattered among the thousands of museums around the world and in private collections. The mounting of a special exhibition, therefore, entails the borrowing of objects from lenders who may number in the hundreds, each of whom has his own reasons and conditions for loans to borrowing institutions.[3] When the objects sought for special exhibition are unique or otherwise of great value, either in commercial terms or in terms of their importance to the cultural heritage of a country, the negotiations for a loan become complex, and special legislation may be necessary before the object may leave the country of origin.

The vast majority of special exhibitions involve relatively small commercial values of risk for the museum, either because the artist assumes the risk of loss and provides his own insurance coverage, if any, or because the objects displayed are not of great rarity or may be repaired, restored, or reproduced with little loss of value to the owner. The insurance coverage for minor exhibitions is substantially the same as for modest amounts of fine arts owned by individual collectors. The fine arts floater policy, providing all-risk coverage, is the most widely used form.[4]

When the special exhibition includes borrowed works of art having market values which rise above nominal levels, the underwriting and claims problems of insurance carriers become more acute. These exhibitions must be dealt with as special risks in the field of inland

3. Intermuseum loan agreements lack uniformity. Although the International Council of Museums (ICOM) recommends eleven sets of conditions for inclusion in such agreements, few museums comply fully. *See* INTERNATIONAL COUNCIL OF MUSEUMS, GUIDELINES FOR LOANS (1973). In a comparative analysis of the loan agreements of twenty-two leading United States museums, the author found concurrence with only one of the recommended guidelines, guideline 4.1: "The Borrower agrees to provide or pay for insurance, or provide an indemnity, acceptable to the Lender."

4. *See* F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 733-34 (1974) [hereinafter cited as FELDMAN & WEIL] (special provisions relating to fine arts in the personal articles floater policy); W. MORTIMER, ADJUSTING PRACTICES INLAND MARINE AND TRANSPORTATION INSURANCE 32 (1951) (helpful discussion of policy language in common use); W. RODDA, INLAND MARINE AND TRANSPORTATION INSURANCE 375-89 (2d ed. 1958) (underwriting, rating, and claims aspects of fine arts floaters, with particular reference to museums); Vance, *A Proposed Standard Insurance Policy,* 48 MUSEUM NEWS, Sept. 1969, at 21 (attempt to design a policy specifically for museums).

marine insurance. It is this special risk category of exhibitions with which this article is primarily concerned.

Museums are among the most important cultural centers in any community, and they have large audience appeal. Estimates of the numbers of visitors to museums in any given year vary widely, but there is agreement among the authorities that museum visits in the United States number in the hundreds of millions.[5] A recent poll revealed that the Metropolitan Museum is New York City's "No. 1 tourist attraction."[6] Attendance at major special exhibitions is impressive. For instance, the People's Republic of China Archaeological Exhibition, which was displayed in 1975 in Washington, D.C., Kansas City, and San Francisco, was seen by a total of about 1.8 million Americans.[7] One writer observed that the National Gallery in Washington draws more than ten thousand visitors per day during special exhibitions.[8] The popularity of museums appears to be universal, although the primary appeal is to relatively young, educated, affluent visitors.[9] Audience

5. "Thirty years ago America's museums reported that their attendance totaled 50 million visits a year. Today the total is known to be in excess of 200 million and probably approaches 300 million." AMERICAN ASS'N OF MUSEUMS, AMERICA'S MUSEUMS: THE BELMONT REPORT at v (1968). The Belmont Report also states that "[l]arge museums currently report that as many as 500,000 school children come to the museum during the school year." *Id.* at 19. Another source estimates attendance at "100 million visits in 1953, 200 million in 1962, 560 million in 1967, and over 700 million in 1969." McGrath, *Preface* to AMERICAN ASS'N OF MUSEUMS, THE OFFICIAL MUSEUM DIRECTORY UNITED STATES-CANADA 1971 (1970). Further statistics show 308,-205,000 visitors throughout the country in the fiscal year 1971-72. Noble, *The Future of the AAM,* 54 MUSEUM NEWS, Sept.-Oct. 1975, at 34. For a statistical analysis of museum attendance see *Hearings on H.R. 8677 Before the Select Subcomm. on Education of the House Comm. on Education & Labor,* 92d Cong., 2d Sess. 188-89 (1972).

6. *Hearings on H.R. 7782 Before the Select Subcomm. on Education of the House Comm. on Education & Labor,* 94th Cong., 1st Sess. 22 (1975) (testimony of Thomas Hoving) [hereinafter cited as *Hearings on H.R. 7782*]. The museum's annual report revealed that "[b]y a margin of two to one, the Museum led all other New York City attractions as a place visitors would recommend to friends from out of town. Seventy-nine percent chose it as their first recommendation for tourists. Lincoln Center and the Museum of Modern Art were tied for second place, with 37 percent." METROPOLITAN MUSEUM OF ART, ANNUAL REPORT 1973-1974, at 15 (1974).

7. "The peripatetic exhibit of Chinese art and archeological finds . . . dazzled some 4 million viewers in seven cities in Europe, Canada and the United States since it began its road show in 1973 . . . ." Washington Post, Aug. 30, 1975, § D, at 4, col. 1.

8. "The show of Impressionist works from Russian collections drew 316,408 viewers during its 30-day run . . . ." *Id.*, Aug. 27, 1975, § B, at 4, col. 1.

9. METROPOLITAN MUSEUM OF ART, ANNUAL REPORT 1973-1974, at 18 (1974). The report states that "[o]ver half (52%) of all visitors are under thirty; better than one in four are students. Sixty-nine percent are under forty. There are more women (60%) than men. Fifty-four percent are college graduates. People with professional

surveys conducted under the auspices of the International Council of Museums in the German Democratic Republic, India, Poland, the Netherlands, and the U.S.S.R. all show trends similar to those found in the United States.[10]

Special exhibitions may be mounted for a variety of purposes. Some critics evaluate these exhibitions in terms of the museum director's objectives.[11] Accordingly, since many directors regard their institutions as theaters rather than classrooms, viewing the role of impresario as more glamorous than that of schoolmaster, the most imaginative exhibitions are deemed the most successful. In the view of one commentator,

> [s]hows expounding the ABC's of art (like the *isms* and how they grew, or the phases of art history), or demonstrating how closely interwoven are social, political and esthetic ideas, can be dull or difficult to assemble, compared with presenting the way-out, provocative and sometimes wildly exciting experiments of successive new waves of young artists.[12]

The pendulum appears to swing from education to titillation and back. From the perspective of cultural heritage, the hazards to museological objects must be considered as costs which should be outweighed by the significance of the exhibition.[13]

While presently no generally agreed-upon standards exist for the content of special exhibitions, committees at the international level, working through the International Council of Museums, and at the domestic level, in the American Association of Museums (AAM) and the Association of Art Museum Directors, (AAMD), have been concerned with developing such criteria.[14] Informally, museum directors agree that loans of valuable objects should be made only for exhibitions that have cultural or scientific merit. Displays which merely promote the personal vanity of individual collectors or propagandize in support of governmental owners are disfavored. Major special exhibitions are widely recognized for their educational and aesthetic values.

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and managerial backgrounds make up 39 percent. A third of the visitors have family incomes of at least $20,000 a year." *Id.*

10. *See* 2 THE ANNUAL 7 (ICOM 1970).

11. *See, e.g.*, Genauer, *Art & The Artist*, N.Y. Post, Sept. 6, 1975, at 32, col. 3.

12. *Id.*

13. *See generally* I. Pfeffer, The Technical and Legal Aspects of Risk Prevention and Financing for Movable Cultural Property, 1975 (unpublished draft for UNESCO Department of Cultural Heritage).

14. One of the stated goals of the International Council of Museums, for example, is "to keep a watching brief on the quality, technical methods and the co-ordination of international exhibitions in which museums take part . . . ." INTERNATIONAL COUNCIL OF MUSEUMS, STATUTES § 3, art. 6 (1969).

Assembling objects for a major exhibition is a complex, costly, time-consuming job. Once the items for display have been determined, their location must be discovered; thereupon, the loan solicitation process begins. In most instances, the curators who plan the exhibition must negotiate individually with each of the many collectors or museum directors who own or control the disposition of the desired art works. If a work is already on loan it may not be available for a particular exhibition. Alternatively, the owner may not wish to lend the work for fear of damage as a result of shipping and handling.

When the Chicago Art Institute mounted its Claude Monet exhibition in 1975, it displayed 30 Monets from its collection and borrowed 91 paintings from other parts of the United States and from Europe.[15] Forty-one of the borrowed works came from other American museums, 5 from foreign museums, and the remainder from private collectors in the United States and abroad.[16] The 121 Monets were on display from March 15 through May 11 and had a market value of forty million dollars. Expected attendance at the exhibition was three hundred thousand. One writer at the time noted,

> [S]electing the paintings to be shown, coaxing them from their owners around the world, cataloging them, insuring them and making sure they arrive in Chicago safe and sound and leave the same way have occupied a good part of the Art Institute's staff for much of the last three years, which is about par for an exhibition of such magnitude.[17]

Some of the major art museums have negotiated long-term agreements with their foreign counterparts for reciprocal exchanges of art collections on a large scale. This type of arrangement materially simplifies the task of assembling a major show. For example, the Metropolitan Museum of Art in New York City and the Soviet Ministry of Culture signed an agreement on August 29, 1975, providing for a "five-year exchange of art treasures that will bring a series of spectacular exhibits to the United States, including icons by the master Andrei Rublev and 'constructivist' paintings of the 1920's rarely shown in the United States."[18] The loan exhibitions from the U.S.S.R. are scheduled to include finery from the 25th century B.C. through the royal period that ended with the revolution of 1917, 125 paintings dating from the 12th century to modern times, masterpieces from the Kremlin, a collec-

15. Klein, *Monet Montage*, Wall Street Journal, Mar. 6, 1975, at 1, col. 1.

16. *Id.* at 25, col. 1.

17. *Id.* at 1, col. 1.

18. Osnos, *(To and) From Russia with Art: A Five-Year Exchange Agreement*, Washington Post, Aug. 30, 1975, § D, at 1, col. 1.

tion of great drawings from Russian museums, and French and Flemish paintings from the Hermitage and Moscow museums. In exchange, the Metropolitan Museum of Art will lend hundreds of its European and American masterpieces from the 16th to the 19th century for display in the Pushkin Gallery and elsewhere in the U.S.S.R. One commentator reported that "[j]udging by the scale of this latest deal, so much of Russia's most valuable art will be tied up over the next five years that arrangements of any significance with other American museums seem difficult."[19]

An earlier agreement between the Metropolitan Museum of Art and the Louvre in Paris, announced in 1972,[20] provided for a program of cooperation to make the treasures of these two great museums available for joint exhibition. This contract provided not only for joint exhibitions and exchanges but also for joint ownership of selected works of art, as well as insurance by each lender of its own property. The Metropolitan-Louvre accord was described as "the most important loan agreement ever made between two of the world's leading museums,"[21] and the number of works to be exchanged was termed "staggering."[22]

Special exhibitions tend to be very costly, both because of the extraordinary precautions, in the form of special guards and equipment that must be taken for museum security, and because of the insurance premiums involved. One study estimated that insurance and museum security each consume nearly one-half of the total special exhibition budgets of large museums.[23]

In his testimony before the Brademas Committee, Thomas Hoving, director of the Metropolitan Museum of Art, reported on the cost of insurance for the major international exhibitions of art works sponsored by his museum. He stated that since 1970, the museum had been involved in nine major international exhibitions, for which the insurance premiums had amounted to $818,000; not a single claim had been paid.[24] Mr. Hoving provided the following table for the Brademas Committee:

19. *Id.*

20. *See* Kamm, *Metropolitan and Louvre to Share Art*, N.Y. Times, Dec. 16, 1972, at 33, col. 1.

21. Shirey, *id.*, col. 3 (statement by Douglas Dillon, president of Metropolitan Museum of Art).

22. *Id.*

23. *See* Pfeffer, *The Insurance Experience of Fine Arts Museums*, NATIONAL UNDERWRITER, Feb. 1, 1974, at 17, Feb. 8, 1974, at 29, Feb. 15, 1974, at 35.

24. *See Hearings on H.R. 7782, supra* note 6, at 8 (testimony of Thomas Hoving).

TABLE I[25]

METROPOLITAN MUSEUM OF ART MAJOR INTERNATIONAL EXHIBITIONS OF WORKS OF ART

| Date—Title | Valuation of Works of Art (millions) | Premiums Paid |
|---|---|---|
| 1970—The Year 1200 | $ 9.8 | $ 46,000 |
| 1970—Before Cortes | 1.3 | 16,200 |
| 1971—Cubist Epoch | 5.5 | 60,000 |
| 1972—Masterpieces of the Metropolitan Museum sent to Japan | 27.6 | 298,000[a] |
| 1974—Masterpieces of Tapestry | 9.1 | 87,000 |
| 1974-75—The Impressionist Epoch[b] | 63.0 | 131,000 |
| 1975—Metropolitan Museum-U.S.S.R. Exhanges[b] | 82.0 | 0[c] |
| 1975—Art of the Momoyama Period | 20.0 | 20,000 |
| 1975—French Painting 1774-1830: The Age of Revolution | 43.5 | 160,000[d] |
| Total | $261.8 | $818,200 |

a. Costs paid by a major Japanese newspaper.
b. Major funding support provided by the Federal Government (NEA and NEH).
c. U.S. Government indemnity; otherwise premiums estimated at more than $450,000.
d. Shared with Detroit Institute of Art; Metropolitan Museum portion $80,000.

Thomas M. Messer, director of the Solomon R. Guggenheim Museum, told the committee that "insurance. expenses and particularly those incurred through the presentation of major international art exhibitions has become one of, if not *the* most destructive item in our difficult efforts to balance our operational budget."[26] Mr. Messer stated that insurance premiums represented 23 to 55 percent of the entire exhibition costs for the Guggenheim Museum. The premiums for the 1972 Piet Mondrian exhibition amounted to $15,000, while those for the Jean Debuffet exhibition in 1973 were $45,000. The insurance cost of the Alberto Giacometti exhibit in 1974 was $90,000, and that of the Max Ernst exhibition in 1975 was $120,000. He concluded, "The total of exhibition premia paid during 1974 and 1975 roughly equal our operation deficits in these years that are now reaching $200,000 or 10% of our entire $2 million budget."[27]

A global estimate based upon a survey of the insurance experience of fine arts museums suggests an annual outlay of $4 million for museum security and insurance for special exhibitions in the United States.[28]

25. For the data comprising this table see *id.* at 9.
26. *Id.* at 25 (testimony of Thomas M. Messer).
27. *Id.*
28. Pfeffer & Uhr, *The Truth About Art Museum Insurance,* 52 MUSEUM NEWS, Mar. 1974, at 23, *reprinted in Hearings on H.R. 7782, supra* note 6, at 11.

It has been estimated that the commercial value of the art collections in the United States represents an investment in excess of $7 billion.[29] This total comprises investment in buildings and improvements of approximately $1.7 billion, exclusive of land values; permanent collections worth $4.5 billion, with concentration in a small number of museums; loan collections valued at $500 million; and special exhibitions worth an average of $300 million each year. The nine exhibitions listed in Table I alone represent aggregate values of $261.8 million. Many special exhibitions in recent years have represented valuations in excess of $25 million per exhibition. For example, the Giacometti exhibition at the Guggenheim was valued at $25 million; the Max Ernst at $40 million; the Chinese Archaeological Exhibition in San Francisco at $50 million; American paintings in exchange for the Scythian gold from Russia at $82 million; and a joint Louvre, Detroit Institute of Fine Arts, and Metropolitan Museum of Art exhibition of French paintings, 1774-1830, at $43.5 million.[30]

Major special exhibitions represent an extreme concentration of values; a handful of museums account for most of the insurance exposure. It is estimated that there are more than 6,000 museums of all kinds in the United States.[31] New museums are being opened at the rate of approximately one a day. Of these museums 99 percent probably account for less than 10 percent of the insurable values of special exhibitions.[32]

The vast majority of museums have special exhibitions which embrace portions of their collections. The frequency of such exhibitions varies in terms of both the scale and the duration of each exhibition. Major exhibitions occur relatively infrequently, while minor shows may be mounted monthly. An unpublished survey conducted in 1975 by the author showed an average duration for exhibitions of approximately five weeks. Of the sampled museums 17 percent had

29. *See id.*

30. *Id.* at 9 (testimony of Thomas Hoving), 11 (Pfeffer & Uhr article), 25 (testimony of Thomas M. Messer).

31. *See* AMERICAN ASS'N OF MUSEUMS, AMERICA'S MUSEUMS: THE BELMONT REPORT 3 (1968).

32. Special exhibitions with high insurable values are the domain of art museums. Art museums comprise only one of eighty-two categories of museums classified by the AAM and represent less than 5% of all museums in the United States. College and university, general, history, natural history, and specialized museums, in addition to historical societies and historic houses and buildings, are more numerous. *See* AMERICAN ASS'N OF MUSEUMS, THE OFFICIAL MUSEUM DIRECTORY UNITED STATES-CANADA 1971, at 928 (1970).

no special exhibitions; among the remaining 83 percent, the number of special exhibitions ranged from one to fifty-one with a median of nine.[33]

### Risk Factors in Special Exhibitions

The fire hazard is regarded as particularly significant in the field of fine arts because of the massive inventories of vulnerable, highly valued works of art which must be concentrated in a single location. Since only a small proportion of a collection may be displayed at any one time, vast amounts of works are stored in warehouses or in special storage rooms within the museum. These concentrations of movable property in a single location represent astronomical values. The catastrophe hazard in the event of conflagration is incalculable. Moreover, the smoke and water damage accompanying a fire may be as injurious to art works as the fire itself.[34]

Fire and allied perils probably pose a more severe threat to permanent collections than to special exhibitions. The extraordinary precautions taken in the case of special exhibitions make them relatively invulnerable to the stationary property hazards.[35] Relatively few special exhibition losses due to fire, smoke, or severe water damage have been reported in recent years.

Negligently placing delicate objects in inappropriate containers and storage facilities contributes materially to damage to works of art, since "[s]torerooms are the areas where pipes break, where roofs and walls and windows leak, where insects, vermin, bacteria can proliferate, where temperatures can rise and drop to extremes, and where, worst of all, dirt can accumulate in embedding layers."[36]

Borrowed works of art are most vulnerable to the perils associated with transportation. Insurance claims for damage to works of art generally stem from negligence on the part of museum employees, packers, and shippers from the time a painting is removed from its

33. American Association of Museum Directors (AAMD), Survey Data, 1975 (unpublished data in author's file) [hereinafter cited as AAMD Survey Data]. The median number of special exhibitions per year, according to an earlier study, was six in 1970, seven in 1971, and eight in 1972. *See* Pfeffer & Uhr, *The Truth About Art Museum Insurance*, 52 MUSEUM NEWS, Mar. 1974, at 25.

34. *See generally* R. HARRISON, THE TECHNICAL REQUIREMENTS OF SMALL MUSEUMS 19 (Canadian Museums Ass'n Technical Paper No. 1, rev. 1969).

35. See text accompanying notes 63-65 *infra*.

36. C. KECK, H. BLOCK, J. CHAPMAN, J. LAWTON & N. STOLOW, A PRIMER ON MUSEUM SECURITY 76 (1966) [hereinafter cited as KECK].

"nail" on the wall, until it is remounted on its new "nail."[37] Of the losses reported by fine arts museums in a recent survey, more than 88 percent represented values of less than a thousand dollars as shown in Table II. Most of these reported losses resulted from mishandling of objects. The majority of claims involved insurance company settlements.

TABLE II[38]

FINE ARTS MUSEUMS, CLAIMS FREQUENCY AND SEVERITY, SPECIAL EXHIBITIONS, 1970-73, UNITED STATES AND CANADA

| Size of Loss Reported | Number of Losses | Percentage of Total |
|---|---|---|
| Less than $1,000 | 153 | 88.9 |
| $1,000 to $2,000 | 8 | 4.7 |
| $2,000 to $3,000 | 1 | .6 |
| $3,000 to $4,000 | 2 | 1.2 |
| $4,000 to $5,000 | 3 | 1.7 |
| $5,000 to $10,000 | 3 | 1.7 |
| More than $10,000 | 2 | 1.2 |
| Total | 172 | 100.0 |

Loss by theft is the most obvious risk to which art objects are exposed. Newspapers and other media devote prime space and time to accounts of theft losses, particularly in the case of well-known works of art or the products of well-known artists. Theft losses may include wholesale looting of the cultural treasures of a country, forgeries of original art on a massive scale, and "artnapping," in addition to isolated thefts.

Comprehensive statistics are not available for measuring the extent of looting of objects of cultural value, although partial catalogs have been prepared.[39] Karl E. Meyer has identified twenty-eight different sites in Guatemala from which important objects have been taken and has noted seventeen such sites in Mexico. He has traced the stolen objects to a variety of museums in the United States.[40] A considerable volume of sculpture from the Maya period has found its

37. "Nail-to-nail" or "wall-to-wall" are terms of art describing the time and place limits of the museum fine arts insurance policies.

38. The data comprising this table are found in *Hearings on H.R. 7782, supra* note 6, at 47 (Pfeffer & Uhr article).

39. *See* Note, *The Legal Response to the Illicit Movement of Cultural Property,* 5 L. & POL. INT'L BUS. 932 (1973). *See generally* K. MEYER, THE PLUNDERED PAST 213-39 (1973) [hereinafter cited as MEYER].

40. *See* MEYER, *supra* note 39, at 213-18.

way illegitimately into American museums.[41] When a work of art with dubious provenance is placed on exhibition, the risk factors are increased. Either the work's valuation may be challenged because a foreign government may be able to retrieve its smuggled art without indemnity,[42] or the object is susceptible to theft for nationalistic motives. In either case the theft hazard is enhanced.

While the exact proportion of faked or forged art objects on display in museums is unknown, it is substantial.[43] As Meyer observes, "since no inventory of art exists, and since museums and collectors continually buy unpedigreed works, there is a chronic hazard of being taken by a forgery. The prevalence of fakes is the venereal disorder of the illicit art market—the punishment for excessive desire and bad judgment."[44] Perhaps the most famous forger of all times was Michelangelo, who had developed techniques for aging his original work to make it appear antique. According to one account, he sculpted a marble god of Love and, at the suggestion of Lorenzo de Medici, sold it as an antique. The sale brought 200 ducats instead of 30 ducats, the normal market price for Michelangelo's work at the time.[45]

More recently, painters such as Elmyr de Hory, who mastered the techniques of leading artists, have produced massive volumes of "original" art. Many museums and galleries have been flooded with these products; this situation raises basic questions about valuations for insurance purposes.[46] In the leading case of *State v. Wright Hepburn Webster Gallery, Ltd.*,[47] the New York attorney general applied for and was denied an order to appoint a receiver pendente lite of approximately sixty-eight paintings made by David Stein and the proceeds of any sale thereof in the defendant's possession. Having mastered the styles of such artists as Chagall, Picasso, Matisse, Braque, Klee, Miro,

41. *See* Zelle, *Acquisitions: Saving Whose Heritage?*, 49 MUSEUM NEWS, Apr. 1971, at 19. *See generally* ART LAW: DOMESTIC AND INTERNATIONAL 229-473 (L. Du Boff ed. 1975) [hereinafter cited as ART LAW]; FELDMAN & WEIL, *supra* note 4, at 527.

42. *See* MEYER, *supra* note 39, at 105.

43. The literature on art frauds is growing. *See, e.g.*, F. ARNAU, THE ART OF THE FAKER (1961); F. KELLY, ART RESTORATION 193 (1972); J. KILBRACKEN, VAN MEEGEREN—MASTER FORGER (1967); O. KURZ, FAKES (1967); F. MENDAX, ART FAKES AND FORGERIES (1955); S. SCHULLER, FORGERS, DEALERS, EXPERTS (1959); Du Boff & Frantz, *What is Real: Authenticity or Aesthetics in Art*, in ART LAW, *supra* note 41, at 477-96.

44. MEYER, *supra* note 39, at 108.

45. *See id.* at 109.

46. C. IRVING, FAKE (1969).

47. 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), *aff'd*, 37 App. Div. 2d 698, 323 N.Y.S.2d 389 (1971).

Cocteau, and Rouault, Stein sold as the original works of such artists watercolors, gouaches, and other paintings which he himself had created. When the gallery exposed these works as fakes, the attorney general asked that the court declare the paintings a public nuisance to be abated and enjoin their sale or transfer.

Artnapping became a significant source of loss during the late 1960's and early 1970's. Major thefts for ransom occurred in Montreal, Boston, Cleveland, and elsewhere. Museum directors and insurance companies have tended to pay ransom for the return of stolen works of art, but because this activity is somewhat clandestine and has received little publicity, the aggregate amount of ransom paid is not known. One observer notes that

> [t]he current practice of capitulating to ransom demands for stolen paintings and sculpture actually encourages further looting. Why not, if thieves escape legal punishment and, in addition, are often recompensed for their crime? That insurance companies prefer paying ransom to reimbursing owners for the full value of their loss is understandable, since, as a rule, ransom adds up to appreciably less, but that museums are following suit seems worse than shortsighted.[48]

Isolated thefts are also a common hazard in the typical exhibition. If the object does not have a high value, the museum usually does not attempt to secure the object with electronic devices but, rather, relies on normal surveillance procedures to prevent theft. Thus it is comparatively easy for a visitor to pocket a small object or to hide a larger one under a coat. Even a painting on the wall, if not too large, can be carried out of the exhibition space. Objects of major importance, however, are secured in a variety of ways so that, while the thief may remove the object, he can rarely escape from the exhibition space without

48. Kuh, *Causes for Complaint*, SAT. REV., July 26, 1975, at 35. Kuh points out that the Boston Museum of Fine Arts negotiated with thieves who stole the Rembrandt *Portrait of Elizabeth van Rijn* in 1975. *Id.* In February, 1975, a Gainsborough was stolen from the Wadsworth Atheneum in Hartford. The thief, who was apprehended, was allowed to go free in return for the undamaged picture when the museum refused to press charges. Five years earlier, the Atheneum had acquiesced in a ransom payment for a stolen Salvador Dali. *Id.* at 36. One observer notes, "There is some history of the ransoming of stolen museum objects in this country but instances of visitor-hours thefts of major items have been rare. Within the past year there have been six instances wherein authorities have agreed to waive prosecution in exchange for the surrender of the property. In four such instances the prime suspect was paid a ransom, or 'reward', and went entirely unpunished. One individual had success in this manner in two separate theft-recovery situations." Bulletin from Joseph Chapman, Apr. 22, 1975, *enclosed in* Letter from Paul N. Perrot, Assistant Secretary for Museum Programs, Smithsonian Institution, to Irving Pfeffer, May 20, 1975.

sounding an alarm or triggering another type of mechanism.[49]

Vandalism and malicious mischief cause frequent damage to art objects. "Portraits with poked out eyes, pencilled-in moustaches and beards, scratches and dents, cuts and fingerprints are common. Groups of school-children are principal culprits."[50] Vandalism to works of art, inspired by greed and poverty, zeal and indifference, war and whims, is experienced in every major culture.[51] Dismemberment of statues, mutilation of paintings, covering up of nudes, cutting of paintings and tapestries into multiples, and breaking off of fragments of important works as souvenirs are all forms of such vandalism.

The inherent vice hazard arises when a work of art contains improper or incompatible materials in its structure. Often-cited examples of inherent vice are inadequately cured wood sculpture, which may split upon later drying, cheap paper, which may deteriorate quickly, and paintings finished in tempera over oil, on which the tempera may peel away.[52] Inherent vice is ordinarily excluded from insurance policies. To some extent all works of art are susceptible to deterioration by inherent vice as a result of exposure to temperature, humidity, atmospheric pollution, and variations in light exposure. Ultraviolet light, which is very active photochemically, is particularly dangerous to water colors, drawings, and paper. Similarly, mold, which tends to grow rapidly, causes adhesive materials to disintegrate.

Earthquakes, floods, hurricanes, and atmospheric changes have caused major losses to valuable collections of art. Perhaps the most significant reported losses of recent times were caused by the 1966 flood in Florence, Italy. Following days of torrential rain, the River Arno crested its banks and inundated Florence. Floodwaters rampaging at a speed of thirty-six miles an hour swept through the streets, carrying everything before them to heights of fourteen feet above street level. The water burst heating systems and carried great quantities of fuel oil, sewage, and other waste materials into churches, museums,

49. Pfeffer, *Fine Arts: A Problem in Risk Management*, 15 CAL. MANAGEMENT REV., Winter 1972, at 123 [hereinafter cited as Pfeffer]. *See also* KECK, *supra* note 36, at 1-13; Gossin, *A Security Chief Comments on Guards*, 50 MUSEUM NEWS, Jan. 1972, at 30; Le Blanc, *Thief-Proofing Our Art Museums*, UNESCO COURIER, Nov. 1965, at 4.

50. Pfeffer, *supra* note 49, at 119.

51. *See* UNESCO, AN ILLUSTRATED INVENTORY OF FAMOUS DISMEMBERED WORKS OF ART—EUROPEAN PAINTING (1974).

52. D. DUDLEY & I. WILKINSON, MUSEUM REGISTRATION METHODS 135 (2d ed. 1968) [hereinafter cited as DUDLEY & WILKINSON]. The authors define inherent vice as the quality by which an object damages itself or deteriorates without external help. *Id.* at 142.

galleries, and private dwellings. Seventy-five hundred acres were covered in a matter of hours and incalculable damage was done to the art treasures of this center of Renaissance art. International funding and an army of students were mobilized for the most massive restoration project of all time.[53]

A major hurricane and resulting flood also devastated the Corning Glass Museum in 1972. In addition, earthquake damage to art objects has been reported from time to time.[54]

Wars, declared or undeclared, have resulted in substantial damage to works of art and, perhaps more important, in looting and mass transportation of valuable objects. While most museum directors have been successful in securing their masterpieces, substantial losses have been incurred. The Mona Lisa has been the subject of several histories recounting her travels during wartime.[55]

The officers and trustees of a museum have bailee liability for borrowed art works. They are held to a standard of reasonable care and may be sued for violation of the terms of the borrowing agreement or for their negligence. Liability may also arise from defamation and invasion of privacy as well as improper authentication of works of art.[56]

While a number of lawsuits have been filed against trustees of museums alleging breach of fiduciary responsibility for failure to insure works of art, there have been no definitive rulings in any of these cases.[57]

### Risk Management

Risk management is a newly-emerging profession devoted to identifying, measuring, controlling, and financing risk. The risk manager's job is to analyze risk control and risk finance by means of a form of research inquiry which adopts a benefit/cost approach. This author has previously described the general procedure as follows:

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53. F. KELLY, ART RESTORATION 214 (1972). *See also* R. BATINI, 4 NOVEMBER 1966: THE RIVER ARNO IN THE MUSEUMS OF FLORENCE (1967) (assessment of the flood damage to documents and works of art in the museums of Florence).

54. *See, e.g.*, Wingis, *David Safe From Ground Rumblings*, 7 BUS. INS., Aug. 13, 1973, at 44.

55. *See* M. SIMON, THE BATTLE OF THE LOUVRE (1971). The author describes how the Mona Lisa was packed in a special case, placed on an ambulance stretcher with special springs and hidden from the Nazis at Chauvigny during World War II.

56. *See* FELDMAN & WEIL, *supra* note 4, at 410, 936, 960-72, 1002-08. *See generally* ART LAW, *supra* note 41.

57. *See, e.g.*, Harris v. Attorney General, 31 Conn. Supp. 93, 324 A.2d 279 (Super. Ct. 1974), *discussed in* FELDMAN & WEIL, *supra* note 4, at 1113. *See also In re* Petition of Trustees of Hyde Collection, *discussed in id.* at 712.

> The first stage is risk identification. This requires a thorough understanding of the existing and potential exposures to risk. The data is obtained from a safety engineering inspection of the premises, a review of the financial and registration records, and discussion with staff members in the various areas of museum operations. After the risks have been identified, their probable effects are estimated, controls are considered, and a program is implemented.[58]

Risk control and risk finance have also been explained:

> Risk control is a generic term for all of the techniques for prevention of loss before a peril occurs and protection of property after the onset of the loss. It includes safety engineering of buildings, packing, shipping and storage of objects, heat, moisture and vibration controls and general museum security. There is an enormous variety of practices and devices from which to select the most suitable means for a given set of needs. Risk finance embraces both insurance and non-insurance transfers of risk as well as risk assumption.[59]

Insurance is only one of the methods of financing employed in risk management; guarantees, self-insurance, and risk assumption are also used.

While the responsibility for risk management in a museum rests with the director, it is normally delegated to the registrars and, in larger museums, to the security officers. Typically, the registrar is charged with supervision of all custodial responsibility for works of art. Whereas the role of the curator is oriented toward artistic considerations, the registrar is a business manager. The registrar must determine what proportion of the budget should be allocated to security measures and what proportion to insurance premiums. Museum budgets are generally inadequate to accomplish both objectives completely.

Standard IX of the accreditation program of the AAM, concerning museum security, raises fifteen questsions for consideration by the accreditation committee:

1. Museum and collections protected against burglary?
2. Against theft and pilferage?
3. Against vandalism?
4. Guards on regular schedule?

58. I. Pfeffer, Strategies for Insurance Cost Reduction in Museums, May 20, 1974, at 2 (UNESCO Committee of Experts on Insurance and Other Forms of Coverage of Risks to Works of Art, SHC./74/CONF.614/7).

59. *Id.* at 2-3. *See generally* J. ADAMS, RISK MANAGEMENT AND INSURANCE: GUIDELINES FOR HIGHER EDUCATION (1972); RISK MANAGEMENT (H. Snider ed. 1964); Pfeffer, *supra* note 49.

5. All parts of institution kept locked or under scrutiny during open hours?
6. Mechanical or electronic system in operation?
7. Written procedure to be followed in case of fire?
8. In case of holdup?
9. In case of vandalism?
10. In case of rowdyism?
11. Procedure known to all employees?
12. All employees know procedure in cases of illness or personal injury to staff or visitors?
13. Records adequate to furnish usable descriptions of missing specimens to police?
14. Insurance of collections in force?
15. Building adequately insured?[60]

Most of the information available to registrars about risk management comes in the form of correspondence with agents and brokers who handle the museum insurance, and insurance representatives are depended upon to implement programs. Recently, the AAM and the AAMD have sponsored seminars and workshops dealing with risk management problems. In addition, the AAMD publishes a risk management manual which brings together much of the available material concerning the subject.[61] Communications are an essential part of effective risk management; deficiencies in this area represent a weakness in contemporary museum administration.

Risk is usually identified by means of a physical survey of the museum premises, a review of museum operations, and consultation with other museums. Numerous published checklists specify hazards and suggest appropriate insurance coverages.[62] These lists are helpful in identifying and evaluating problems that might otherwise be missed.

The principal risks may be classified under the headings of property damage (including damage from transit mishaps), theft, liability, and damage by personnel. From the standpoint of special exhibitions, the most significant hazards are those involving property damage, including injury in transportation, and theft.

The security measures employed by museums are designed for

60. AMERICAN ASS'N OF MUSEUMS, MUSEUM ACCREDITATION: A REPORT TO THE PROFESSION 36 (1970).

61. *See* RISK MANAGEMENT MANUAL (I. Pfeffer & D. Herrick eds. 1975) [hereinafter cited as RISK MANUAL].

62. *See, e.g.*, B. DAENZER, FACT-FINDING TECHNIQUES IN RISK ANALYSIS (1970); R. MEHR & B. HEDGES, RISK MANAGEMENT IN THE BUSINESS ENTERPRISE 254-92 (1963); RISK MANAGEMENT MANUAL (M. Lenz ed. 1974).

both prevention and protection. Preventive measures include the use of guards, video monitoring systems, electronic alarm systems, devices regulating the movement and environment of physical objects,[63] and loss prevention procedures. The dilemma for risk management is that the most effective loss prevention measures are those which would provide the least amount of visitor access to the works of art on display. Since an important goal of an exhibition is generally to permit a maximum of personal and immediate contact with the objects, the range of feasible preventive techniques is narrowed.

Perhaps the most protective measures are fire extinguishing systems and burglar alarm systems. The unique character of the objects on display and the concentration of visitors in confined spaces pose special protection problems. Water sprinklers may do more damage than is done by fire; carbon dioxide fire extinguishers may be toxic to humans and damage materials such as wood, paper, and fur;[64] alarms may cause panic, inflicting personal injury losses more severe than the property loss.[65]

For reasons of economy, museums use a wide variety of approaches to risk financing.

Assumption of risk is very widely applied, particularly in the case of regional exhibitions of the works of living artists. Generally the artist is expected to bear the risk in such an exhibition; the museum does not attempt to provide insurance or indemnities in the event of loss or damage. Even in larger shows, only a portion of the risk is assumed by the museum, either because the museum fails to insure to value or because its policy contains a deductible.

Reciprocity between borrowers and lenders with respect to risk financing is being used more frequently by major museums as a means of reducing insurance costs. In a typical agreement, such as that between the Metropolitan Museum of Art and the Louvre or between the Metropolitan Museum of Art and the Soviet Ministry of Culture, each party agrees to lend art works of approximately equal value without requiring that the other party insure the objects. The effect

63. These devices are highly refined. In one instance, "[a]larm bells rang, steel shutters clanged down and a dozen guards with guns drawn closed in . . . to protect . . . Gainsborough's 'Lord Stanley' . . . . A moth had settled on the painting and the flutter of its wings had triggered the delicate alarm system." Washington Post, Aug. 13, 1975, at 8, col. 8.

64. Chapman, *Fire*, 50 MUSEUM NEWS, Jan. 1972, at 35.

65. For a discussion of the use of alarm systems see R. HOWARD, MUSEUM SECURITY 7-8 (AAM Publications, New Series No. 18, 1958).

is to make each of the parties assume its own risk of loss and provide for it in accordance with its own risk management program. Reciprocity results in a very material reduction of cost by removing the requirement of special coverage for international loans.[66]

Increasing numbers of governments are adopting indemnity schemes patterned after the British system. Under such a scheme the government undertakes to indemnify the lender in case of loss. The borrowing institution, therefore, need not purchase commercial insurance. The saving in premiums is substantial, and the experience of the British government has been favorable. The United States government has provided such indemnities for two major traveling exhibitions without loss.[67]

The insurance decision is primarily affected by questions of cost. A number of different approaches have been used to reduce the expenditure for premiums. Informal buyers' pools have been organized as one means of lowering costs.[68] In addition, subsidies have been obtained from the National Endowment for the Arts, as well as from private donors, to pay for insurance premiums.

There is general recognition within the museum profession that the risk management function is not being performed as effectively as required by the budgetary restraints faced by museums. Programs sponsored by AAM, the AAMD and the Smithsonian Institution are attempting to train museum personnel in legal and insurance aspects of risk management.

## The Fine Arts Insurance Market

The fine arts insurance market comprises an infinitesimal volume of premiums in comparison with the commercial insurance market at large. In 1973, life insurance premiums in the United States were estimated at $33,144 million; non-life insurance was $55,528 million.[69] Of this combined $88,672 million, museum fine arts insurance ac-

66. Kamm, *Metropolitan and Louvre To Share Art*, N.Y. Times, Dec. 16, 1972, at 33, col. 1.

67. See text accompanying notes 147-54 *infra*.

68. The Western Association of Art Museums has provided group coverage for many years on a favorable basis. Several national insurance brokerage firms have also attempted to create "pools" for museum insurance. *See* Allen & Block, *Should Museums Form a Buyer's Pool for Insurance?*, 52 MUSEUM NEWS, Mar. 1974, at 32.

69. O. Jenni, Monetary Problems of International Reinsurers, Dec. 15, 1975 (unpublished paper in author's files for Swiss Reinsurance Co., Zurich). These data include only domestic premiums rather than total premium income of American insurance companies.

counted for about $2 million[70] or 0.002 percent. Most of the major inland marine insurance carriers underwrote some of the museum exhibition risk;[71] the larger proportion of the premiums were ultimately exported to Lloyd's of London.[72] As a practical matter, the insurance premium aspect of the museum exhibition market primarily involves perhaps one hundred museums in the United States placing insurance with about fifty primary insurers. The results are aggregate policy limits of several billion dollars, very low probabilities of loss, and low premiums. In reply to a query about Lloyd's syndicates which specialize in art insurance, a syndicate leader said, "The total premium on work of art insurance is small and even with a specialist Underwriter this premium is unlikely to exceed five percent of his total premium. Of this five percent about two-thirds is probably from the art world."[73]

The fine arts insurance market has been characterized as potentially catastrophic because of the very high and fluctuating values of collections of works of art.[74] The limits of risk retained by most insurance companies are comparatively small in relation to the high values involved; reinsurance is universally employed in this field.[75] The number of insurance carriers who must share the risk in any important exhibition is substantial and, while the risk exposure is high, the actual premiums collected constitute a small proportion of the exposure.[76] The ratio may be as little as one dollar in premium for each two thousand dollars of risk.

Primary insurers are reluctant to issue policies for the full amount of coverage required because of the possibility that reinsurance recoveries may not be as prompt as the insurers' duty to pay claims. Suppose that a $50 million policy is issued by an insurer who retains $100,000 for his own account and reinsures the balance. His retained premium, hypothetically, might be as little as $100. Suppose, further,

70. *Hearings on H.R. 7782, supra* note 6, at 12 (Pfeffer & Uhr article).

71. Talit, *Art Thefts Cause Capacity Crunch Among Insurers,* 8 BUS. INS., Dec. 9, 1974, at 68 [hereinafter cited as Talit].

72. *Id.* at 69; *see Hearings on H.R. 7782, supra* note 6, at 50 (remarks by Representative John Brademas).

73. Gordon, *Insurance for Works of Art,* in RISK MANUAL, *supra* note 61, at 128.

74. *See* Pfeffer, *supra* note 49, at 120.

75. The insurer who issues the insurance contract, the "primary" insurer, normally retains a modest amount of the risk for his own account and cedes the excess above his "retention" to one or more "reinsurers" who, in turn, may retain only a portion of the reinsurance and "retrocede" the excess above their retention to other reinsurers, thereby spreading the risk on an international basis.

76. "This insurance is just too cheap, cheaper than the risk deserves." Talit, *supra* note 71, at 68 (statement by Aetna Casualty & Surety Insurance Company executive).

that loss amounting to $5 million is sustained by the covered museum. The insurer is obliged to settle his loss promptly, but he might not have been paid by the reinsurers by the time he must disburse funds to the insured. The result is that the insurer might be out of pocket to the extent of millions of dollars while he will have received a net premium of only $100. This financial risk is one which insurers are reluctant to assume.

The accumulation of risk factor provides an additional reason for caution in the insurance and reinsurance of high limit target risks. Most reinsurers engage in a measure of reciprocity whereby they automatically cover one another's risks with limits specified in their treaties. Most reinsurance treaties provide for reinsurers to "follow the fortunes" of the ceding company without attempting individual risk underwriting or record-keeping. The system usually works well. Suppose, however, that insurance company *A* has a retention limit of $100,000 per risk, and that *B, C, D,* and *E,* with whom *A* exchanges reinsurance, have identical limits. If *A* issues an insurance policy with a limit of $500,000 on a single risk, it expects to retain $100,000 and cede the remainder to its reinsurers. Insurance company *A* will also protect its underwriting position by soliciting risks which are geographically dispersed in order to reduce the likelihood of multiple losses from a single catastrophe. This underwriting strategy is intended to permit the law of large numbers to operate within the limits of the $100,000 retention per risk that company *A* maintains. In the category of fine arts insurance, however, many of the risks underwritten by company *A*, on a geographically distributed basis, converge in a single location for a single exhibition. In case of a major disaster during an exhibition, company *A*'s exposure on its retained business multiplies by a significant factor. The problem is compounded by the fact that *A* will have accepted, by reciprocity, some of the reinsurance on the very same risks which were retroceded to it by companies *B, C, D,* and *E.* Avoidance of target risks is one solution to the accumulation of risk problem, but it is unhelpful to the museum director attempting to mount a major exhibition.[77]

A standard exclusion of many reinsurance treaties is a target risks exclusion clause, which specifies most well-known bridges, such as the Golden Gate Bridge, and tunnels, such as the Holland Tunnel, as well as major fine arts collections, such as the Mellon, Frick, and Kress collec-

77. *See* R. REINARZ, PROPERTY AND LIABILITY REINSURANCE MANAGEMENT 158-60 (1968); Pfeffer, *supra* note 49, at 121.

tions.[78] The result of the target risks exclusion clause is to isolate special risks to protect the portfolios of reinsurers and to narrow the insurance and reinsurance market availability for large risk concentrations, such as major special exhibitions.

The capacity problem limits the underwriters of special exhibitions primarily to the major insurance companies in the inland marine insurance field and to the underwriters at Lloyd's of London.[79]

The insurance broker plays an indispensable role in the placement of special exhibition insurance because, in general, no one company is prepared to underwrite the entire risk. To be effective, the broker must have access to one of the informal syndicates through which major fine arts insurance lines are placed. If he does not have direct access to these markets, he will probably be required to split commissions and share the business with a broker who does. Because of the sensitivity of underwriters in the market for high limit fine arts insurance, the broker inevitably faces a conflict of interest. He owes a duty to his fine arts insurance client to obtain the coverage desired at the lowest available rate. At the same time he must negotiate rates which are excessive relative to the experience of the museum in order to satisfy the insurance carriers that this line of business is profitable. With relatively uniform commission scales for placing the insurance coverage,[80] brokers' incomes are adversely affected by lower insurance rates for a given class of business. One consequence of this conflict is that, historically, rates for special exhibitions have been excessive by a margin of several hundred percent. The loss ratios of museums have been abnormally low for many years.[81]

It has been noted in this regard:

> There is considerable variation in the insurance-buying practices of art museums with respect to the use of agents and brokers or consultants. In the [1973] survey, 81.6 percent of the respondents

78. K. THOMPSON, REINSURANCE 422 (4th ed. 1966).

79. For a listing of some of the principal insurers in the field see Talit, *supra* note 71. The 1973 survey of the AAMD found more than forty-five United States insurance companies reported as lead insurers on museum policies. *See Hearings on H.R 7782, supra* note 6, at 47 (testimony of Irving Pfeffer). This figure represents a small proportion of licensed inland marine insurers.

80. Stock insurance companies licensed in New York State and operating countrywide paid an average direct commission and brokerage expense of 18.5% in 1974 for inland marine insurance business. Other acquisition expense was 4.7%, for a total of 23.2%. For mutual insurance companies, direct commissions and brokerage expense averaged 10.8%, but when combined with other acquisition expense totaled 20.9%. *See* New York Insurance Dep't, 1974 Loss and Expense Ratios, Dec. 19, 1975 (press release).

81. See Tables III, IV & V *infra.*

> reported that they use a single brokerage firm for placing their insurance. In many cases, it appears that local insurance agents' associations jointly handle the insurance for public institutions. . . . In situations where secrecy surrounded the insurance management process, premiums were found to be remarkably high. The first time a competitive bid was allowed or entertained, the rates plummeted. Some museums pursue the questionable practice of placing their insurance through brokerage firms whose principals are members of the museum's board of trustees.[82]

Competitive bidding has been used successfully by a number of museums as a means of reducing the cost of insurance protection.[83] While competitive bidding requires much more preparatory work on the part of the registrar, it provides an opportunity for all interested segments of the insurance industry to participate. Provided that such bidding is not conducted too frequently, the insurance market tends to be receptive to it. The possibility of obtaining better terms and conditions is, therefore, enhanced. In absence of competitive bidding, the insurance broker who handles the account may have less incentive to strive for lower cost.[84]

## Underwriting Special Exhibition Risks

The process of underwriting insurance of museum collections involves recognition of the principal hazards, resolution of coverage problems, establishment of acceptance standards, and determination of proper premium charges.

The principal hazards to museum collections have been identified above as fire, smoke, water damage, windstorm, flood, and other property damage catastrophes; theft, artnapping, vandalism, and malicious mischief; and the transit mishaps associated with faulty packing, shipping, storage, unloading, and unpacking.[85]

Two additional hazards, moral hazard and morale hazard, are recognized by insurers of museum exhibitions.[86] Moral hazard is

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82. *Hearings on H.R. 7782, supra* note 6, at 17 (Pfeffer & Uhr article).

83. Competitive bidding has been successfully employed by the Smithsonian Institution, the Los Angeles County Museum of Art, and the Dayton Art Institute, among others. *See* Bid Specifications, June 30, 1975 (unpublished data in author's file).

84. Pfeffer, *Competitive Bidding for Insurance*, 22 RISK MANAGEMENT, Jan. 1975, at 22.

85. See text accompanying notes 34-57 *supra*.

86. The commission of crimes motivated by collection of insurance proceeds has a long history, in all branches of insurance. The propensity of the insured deliberately to increase the chance of loss is termed "moral hazard." The negligent behavior of the insured which increases the chance of loss is termed "morale hazard." These hazards are regarded as uninsurable for most lines of insurance. *See* I. PFEFFER, INSURANCE AND ECONOMIC THEORY 62 (1956).

defined as fraud on the part of the insured. It includes such practices as filing of false claims of loss by theft or fire in order to collect insurance proceeds; falsification of loss by theft in order to conceal evidence of freshly discovered frauds or imitations; excessive valuation by lenders to rig the resale prices of loaned art; and exaggerated depreciation of damaged works of art. Although the problem is rarely encountered in nonprofit art museums, it appears more frequently in dealings with private lenders.

Morale hazard, carelessness on the part of the insured, is of greater significance to insurance underwriters. Common examples of such carelessness include exposure of property at fairgrounds and exhibitions, damage incurred in renovation and repair, and marring and scratching, as well as wear and tear. Under the heading of wear and tear are included such loss causes as inherent vice, mechanical breakdowns, and electrical short circuits.

Museums demand the broadest forms of all-risk insurance for special exhibitions. Generally, coverage is on a "nail-to-nail" or "wall-to-wall" basis.[87] The principal coverage limitations embrace hazards that are so familiar, that rates can be set with considerable accuracy, as is the case with property normally insured under automobile policies; and hazards such as war damage which are so inherently catastrophic as to make rates prohibitively high.

Policy exclusions are commonly based on the need to clarify the coverage, the desire to eliminate risks which are uninsurable at acceptable rates, or the attempt to exclude coverage that might encourage morale hazard.

Typically excluded in museum fine arts insurance contracts are:[88] first, "buildings, equipment and tools"; second, "shipments by mail unless registered first class mail or parcel post"; and third, "insured property on fair grounds."

Hazards commonly excluded from coverage include:

1. "Wear and tear, gradual deterioration, moths,[89] vermin, inherent vice or damage sustained due to or resulting from any repairing, restoration or retouching process";
2. "Nuclear reaction or radiation";

87. See note 37 *supra*.

88. *See* Nauart, *Insurance Policy Comparisons for Registrars*, in RISK MANUAL, *supra* note 61, at 46, 50, 52 [hereinafter cited as Nauart].

89. *Id.* at 50. Some forms of policy use insects rather than moths in this exclusion clause.

3. "Loss or damage to property shipped under 'On Deck' Bills of Lading;"

4. "Hostile or warlike action in time of peace or war";

5. "Any weapon of war employing atomic fission or radioactive force whether in time of peace or war";

6. "Insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combatting or defending against such an occurrence, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority or risks of contraband or illegal transportation or trade."[90]

Underwriters will accept arts risks when they are satisfied that there is no moral hazard and that there are fair market valuations, adequate security, and satisfactory transit arrangements. The absence of moral hazard is determined by means of inspections and background reviews of employees. The market valuation of insured objects or interests requires expert appraisals, with special recognition of the problems associated with contemporary works, lesser artists, fads, and the short-term influence of economic conditions. The underwriter must be satisfied that measures have been taken to control the risks of loss by fire, theft, breakage, vandalism, and catastrophe. Loan agreement conditions are carefully examined as an important source of information about planned packing, shipping, and inventory controls.

In the relatively unregulated fine arts line, the underwriter must set rates and determine contract provisions without the benefit of rate manuals or standard forms. Insurance exposures of various museums reflect a lack of homogeneity and a lack of credible loss experience data for major losses. The problem is compounded by the shortage of risk management talent among museum personnel, which results in inadequate presentations of insurance proposals. Furthermore, underwriters tend to be skeptical of favorable loss results because of substantial adverse publicity about the theft experience of Italian churches.[91] Finally, the volatile international reinsurance capacity, coupled with premiums which comprise a very small proportion of exposure limits,

90. *Id.* at 50-52.

91. "So slight are Italian security precautions that art thieves work with a certain nonchalance. While taking a Titian and thirteen other works from a church near Cortina d'Ampezzo in 1971, the brigands paused to drink Communion wine." MEYER, *supra* note 39, at 83.

makes for reluctance and conservatism among inland marine underwriters.

Fine arts insurance for museums is an inland marine insurance line which is regarded as nonstandard with respect to rate regulation. Each insurance company is free to determine its own terms and conditions for this class of risks. There are two principal rate-making organizations in the United States; each serves a different segment of the inland marine insurance industry. The Insurance Services Office gathers premiums and loss data from its member companies but does not attempt to promulgate rates or forms for this line of insurance.[92] The Transportation Insurance Rating Bureau serves its member companies in similar fashion.[93] Neither of these rating organizations pretends to represent the experience of the museum fine arts business in a comprehensive manner. Historically, both organizations have combined the experience of museums with that of art dealers in presenting their statistics.[94]

The London market in fine arts insurance for museum exhibitions is maintained by several syndicates at Lloyd's of London. The custom is for each exhibition to be underwritten, with terms and conditions acceptable to the syndicate leaders, on an individual basis. Because of the concentration of business in one or two channels, there is a tendency for terms and conditions to be somewhat standardized at any particular time. The London market is attractive largely because it is quick and dependable and has a large capacity.

### Rate-Making

The price of insurance for special exhibitions is a function of the adjusted museum fire rate, the loss experience of the insured, and industry-wide results.

In establishing the museum rate, the underwriter starts, typically, with the basic fire contents rate. This is a rate determined for a standard building in a standard community. To the basic fire contents rate

92. Interview with Michael D. Ruback, Executive Assistant, Insurance Services Office, in New York City, Sept. 3, 1975.

93. Letter from W.D. Weed, General Manager, Transportation Insurance Rating Bureau, to Irving Pfeffer, Sept. 16, 1975.

94. Effective March 1, 1975, the former fine arts classification code, Code 3312 for Dealers and Museums, was divided into two codes—3313 for dealers and 3314 for museums. AETNA INSURANCE CO. STATISTICAL DEP'T, CODING BULLETIN, Ser. 30, No. 75-01 (Feb. 14, 1975).

are added a loading[95] for the municipal fire protection territory, a loading for unprotected territory, and a loading for windstorm and hurricane exposure. An adjustment for the transit exposure is added to this modified fire contents rate. The composite rate is then adjusted, using a judgment factor for special features of the risk. The result is the actual rate per hundred dollars of value for the museum.

The actual rate charged to the museum is subject to change based upon the impact of competition, the industry-wide loss ratios on a historical basis, the credibility of the reported experience of the insured, and the status of available reinsurance market capacity. Ultimately, while the rate contains standard components, it is determined subjectively rather than scientifically. As one commentator notes, "[i]n the field of fine arts, an insurance company can do with rates pretty much what it feels any particular organization deserves. There are no holds barred in creating an insurance program tailored to the requirements of an individual museum."[96]

## Insurance Coverage

The valuation of works of art for insurance purposes is very difficult because of the unique quality of important art objects.[97] The museum may appraise the objects at acquisition cost with adjustments for inflation, or it may reappraise its objects periodically. Most museums do not have complete inventory records of their objects and, except in cases of borrowed objects, valuations are not reliable or generally available.[98] The valuation clause of an insurance policy frequently provides as follows:

> (a) Property of the insured shall be insured for and valued at the amount for each article indicated on the books and records of the insured prior to loss according to the insured valuation of each object insured.

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95. A "loading" in insurance is a surcharge above the pure loss cost of a particular risk or class of risks. Generally, this surcharge comprises an expense factor for management of the business, but it may also serve as a modification to adjust for special factors such as inflation, trend, or special circumstances of a particular risk.

96. KECK, *supra* note 49, at 16.

97. For a useful review of the valuation problem in the context of income and estate taxation see Beghe, *The Artist, the Art Market and the Income Tax*, 29 TAX L. REV. 491, 520 (1974).

98. One art registry system uses a computerized identification and registration system which involves photographing a work of art, projecting it on a screen, superimposing a grid on it, and scanning it for unique characteristics that are translated into digital information and fed into a computer. A duplicate record is maintained at Interpol headquarters. AMERICAN INSURANCE ASS'N, FIRE MARSHALL REPORTING SERVICE (Oct. 6, 1972).

> (b) Property of others loaned to the insured and for which the insured may be legally liable, or which the insured has been instructed not to insure, shall be insured for and valued at the amount agreed upon for each article by the insured and owner(s) as recorded on the books and records of the insured prior to loss.
>
> (c) Otherwise, in the absence of recorded values or agreed values for each article insured, Underwriters shall not be liable beyond the fair market value of the property at the time any loss or damage occurs. Said value shall be ascertained by the insured and Underwriters or, if they differ, then the amount of value or loss shall be determined as provided in the Appraisal clause of the Policy.[99]

One expert observes,

> Appraisal of value is a ticklish business. An insurance company may be willing to sell you a policy for any valuation you choose to place on your object, but nevertheless, in case of claim for loss or damage you will find the burden of justifying this evaluation rests on you. Get supporting evidence for monetary appraisals.[100]

The valuation problem becomes most severe in those cases in which there has been a partial loss and the parties disagree about the extent of depreciation. In such cases, the parties must resort to arbitration.

Exhibition insurance usually requires special drafting to fit the needs of the particular situation. Limits of liability and objects insured must be carefully identified. Specification of premiums, recordkeeping, reports, and notices is required. The policy must provide for deductibles, property covered, property excluded, perils excluded, and territorial limits. Generally, legal liability of the bailee is covered. The policy usually provides for wall-to-wall or nail-to-nail coverage and has clauses relating to valuation, appraisal, pairs and sets, additional insureds, and other insurance.

Provisions relating to notice, proof, adjustment, settlement, and salvage are essential. Duties of the insured, including the obligation not to assume liability, must be spelled out. Finally, with due regard for the needs of the particular exhibition, the policy generally provides for cancellation, special definitions, conditions applying to overseas transits, and general conditions.

Clauses excluding breakage of fragile objects and loss due to dishonesty of museum personnel are among the customary exclusions in the fine arts insurance policy which are frequently removed by

99. Nauart, *supra* note 88, at 53.

100. C. Keck, Safeguarding Your Collection in Travel 45 (1970).

endorsement.[101] Policy liberalization by endorsement may also include:

> 1) The payment of the current market value of objects at the time of loss; 2) the insurance of the museum's interest in remainder gifts and jointly owned property; 3) the insurance of trans-oceanic shipments (ocean and air transit coverage); 4) coverage during strikes, riots and civil disturbances; 5) bailee or legal liability (protection in case lenders' insurers subrogate against borrowing museums . . .).[102]

Policy conditions which restrict the protection of the insured should be examined carefully and reworded to meet the needs of the museum. For example, the museum should be required to report a loss or damage "immediately after its discovery," or "as soon as practicable" rather than "immediately after it occurs."[103] Similarly, it is recommended that if a warranty on the use of competent packers is included in the policy, it be rephrased so that the museum will provide for insured objects to be packed and unpacked by competent packers "to the best of its ability."[104]

Reporting of insurance values on an item by item basis can be an onerous burden on the museum, particularly when values may fluctuate rapidly owing to market changes. Insurance value reporting requirements can be adapted to the convenience of the museum by modifying the insurance reporting provision in the contract.

Because of the lack of standardized coverages, contracts vary materially in their terms and conditions. A study, in which Nauart compared two commonly used contracts on a clause-by-clause basis showed material variations with respect to most provisions.[105]

Deductibles are commonly used in the insurance of permanent collections but are rarely found in the coverage of special exhibitions. Both the lender and the borrower prefer to have the insurer assume the full liability in case of loss. This attitude is compatible with the lender's demand for insurance coverage. In the case of a government-owned borrowing museum, the likelihood of a time-consuming appropriations process based on line-by-line budgeting makes deductibles unattractive.

Retentions, the amounts of risk not transferred by means of insurance, tend to be substantial when insuring permanent collections.

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101. DUDLEY & WILKINSON, *supra* note 52, at 135.
102. *Id.*
103. *Id.* at 136.
104. *Id.* at 135-36.
105. *See* Nauart, *supra* note 88, at 44.

Few museums attempt to insure these collections to full market value. The majority insure only a portion of their collections because of cost considerations and assume the risk beyond the insurance limits. In the case of special exhibitions, however, insurance to value is common.[106]

## Claims Problems

Insurance claims arising from art exhibitions frequently involve problems of identification of loss, inventory shortages, depreciation, subrogation, and common carrier liability.

Since loans for a special exhibition are usually insured by the borrowing museum under an all-risk nail-to-nail or wall-to-wall policy, values must be recorded and reported promptly to the insurers. These reports, as well as any claims for damages, are generally made by the registrar, although in some museums they are handled by the treasurer or business manager.[107]

Generally, a report is prepared for each object, borrowed or loaned, specifying its condition at the time of shipment or receipt, and including a precise description and photographs. When a loan is returned, the objects are checked immediately for any damage or change in condition. Minor changes not requiring attention are merely noted in the condition report, but more serious changes or damages are brought to the attention of the curator or director, who decides what repairs are necessary and whether to file an insurance claim. The date on which the object was returned is noted on both the receipt and the registration card which records the location or history of the object. If insurance coverage was cancelled during the period of the loan, it will be reinstated.

Inventory shortages are sometimes reported by museums after periodically conducted revaluations. Occasionally, in special exhibitions involving large numbers of objects, some items disappear as a result of negligence or pilferage in the process of shipping from one museum to the next.[108] The common carrier usually attempts to limit its liability in case of loss or damage to a maximum amount specified in a released bill of lading or special contract. Even when no such amount has been specified, liability is generally limited. The prevailing view is that "[c]arriers assume only a limited liability for goods

106. Availability of reinsurance on favorable terms is a determining factor in the coverage of special exhibitions.

107. *See* DUDLEY & WILKINSON, *supra* note 52, at 136.

108. AAMD Survey Data, *supra* note 33.

entrusted to them unless a value in excess of the customary or statutory liability is declared by the shipper. In this case, however, there are additional charges based on the value declared."[109]

While there is agreement when a loan is negotiated with respect to the value of the borrowed object in case of total loss, such agreement can rarely cover partial loss to the complete satisfaction of the parties. From an insurance point of view, the problem is compounded because the lender is inclined to claim a nearly total loss regardless of how small the actual damage may be, whereas insurance underwriters argue that the amount of loss should be measured by the cost of restoration. The problem is exacerbated in the case of multiples by living artists; while the reproduction cost is nominal, the artist is likely to contend that the particular damaged object is irreplaceable.

A related problem is that of salvage. If it pays a total loss, the insurance carrier is entitled to ownership of the damaged object. The market value of the salvage, however, may be greater than the depreciation on which the parties can agree, with the result that the museum is left with the worst of both worlds: it has sustained a depreciation loss, but it cannot make an insurance recovery because it has undervalued the object for purposes of insurance.

To the extent of the indemnification afforded by the contract of insurance, the insurance company is entitled to any rights of the insured to collect its loss from a third party under the rules of legal liability. In fine arts insurance, for example, insurance companies may subrogate their claims against carriers if loss is caused by negligence in transit.[110] An insurance company may also subrogate a claim against another museum when negligence of museum employees is found. Museum officials are reluctant to prosecute subrogation claims against lenders because of the likelihood that they will want to borrow from the same lenders on future occasions. A successful plaintiff may find it embarrassing to try to borrow additional valuable objects from an unsuccessful defendant. In order to remove the public relations problems associated with subrogation provisions, many museum exhibition policies contain waiver of subrogation clauses.[111] Such clauses increase the cost of insurance.

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109. DUDLEY & WILKINSON, *supra* note 52, at 98.

110. Some insurance companies require the insured to purchase special contract forms to protect the companies' rights of subrogation against common carriers. *See, e.g.*, C. KECK, SAFEGUARDING YOUR COLLECTION IN TRAVEL 46 (1970) (special fine arts contract of REA).

111. Legal liability for subrogation may also be avoided by endorsing the policy

Common carriers are used extensively in the transportation of objects displayed in museum exhibitions. The released bill of lading provides limited liability for such carriers at levels so low as to be virtually worthless as to the borrowing museum. To overcome this problem, the museum must either increase by agreement the limits of coverage provided by the common carrier or provide for its own coverage. A large proportion of claims arises from the acts of carriers, and duplicate coverage often results in loss adjustment complications.[112]

## Insurance Loss Experience of Fine Arts Museums

Until recently, there was little information available on the actual experience of museum fine arts insurance. Insurance underwriters suspected that the experience was favorable,[113] but other commentators, basing their impressions on press accounts or church thefts, expressed doubts. Museum insurance rates tended to be based on the more pessimistic view.

In an early work on fine arts insurance, W. Drewes observed, without citing statistics, that "[w]ith the growth of fine arts underwriting, *the present low ratio of loss which is at an almost abnormally low level, cannot be maintained.*"[114] He added that "the companies will have to find some means of achieving the purpose of preservation by collecting and classifying all available information and physical knowledge pertaining to art and all such objects that fall under the heading of Fine Arts Insurance. This information should be available to all companies, underwriters, agents, brokers and eventually also to the public. It would place the insurance of Fine Arts on a sound basis, by which both the insurance companies and the insured public cannot but benefit

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to make the lender an additional named insured or by obtaining a hold harmless agreement from the owner of the borrowed object.

112. One author discusses the loan receipt as a subrogation device designed to overcome the dilemma of bill of lading provisions which require the carrier to receive the benefit of any insurance carried by the shipper, while insurance policies carry a warranty that the insurance should not inure directly or indirectly to the carrier by stipulation in the bill of lading. R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 68-87 (1964). The bill of lading provisions were held valid in Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312 (1886). The insurance policy provisions were held valid in Bradley v. Lehigh Valley R.R., 153 F. 350 (2d Cir. 1907); Pennsylvania R.R. v. Burr, 130 F. 847 (2d Cir. 1904).

113. The loss ratio for the museum and art dealers classification published by the Inland Marine Underwriters Association was for many years well below the average for all classes of property and liability insurance combined. See Table III & note 118 *infra.*

114. W. DREWES, FINE ARTS INSURANCE 60 (1938) (emphasis added).

greatly."[115]

A contrary view is that of Derek Kinnane, who attributes to William A. Bostick, administrator of the Detroit Institute of Arts, the assertion that "insurance premiums have risen 200 percent over the last two years . . . ."[116] Bostick is reported to have asserted that because of this increase, "some museums could only insure their collections at half their value. No wonder then, that most museums, especially outside the United States, prefer to spend their money on theft and damage prevention."[117]

Kinnane cites figures on thefts in Italy to support his position: "Roughly 44,000 works of all kinds have been stolen in Italy since the Second World War and no fewer than 26,000 of them in the last eight years. And the rate of theft is growing—5,843 in 1972, 8,520 in 1973 and 10,952 last year."[118] Karl Meyer is quoted as stating that "by conservative estimate, a $100,000,000 worth of stolen art is currently at large, and, by general agreement, the rate of recovery has been dismal."[119]

No comprehensive long-term statistical data exist covering the insurance experience of art museums in the United States. The empirical data available are fragmentary and not strictly comparable.[120] The three main sources of information are the Insurance Services Office, a rate-making body in New York, the Transportation Rating Bureau, a rate-making body in Chicago, and the annual surveys conducted under the auspices of the Association of Art Museum Directors.

Beginning at least as early as 1946, the Inland Marine Underwriters Association collected data on inland marine premiums and

115. *Id.*

116. UNESCO FEATURES 23 (Nos. 679-80, 1975).

117. *Id.*

118. *Id.* at 20.

119. *Id.*

120. *See Hearings on H.R. 7782, supra* note 6, at 12 (Pfeffer & Uhr article). It was noted that "[i]n London, the fine arts experience is grouped with bullion shipments and precious gems which are risks of an entirely different character. In one instance, the fine arts experience was pooled with the loss experience of coal cargoes shipped on English inland waterways. In the United States, the tendency among insurance underwriters is to group museum fine arts with the experience of private collectors and fine arts dealers who have a substantially different exposure to risk. In short, there have been no statistics on the insurance experience of large numbers of museums other than what individual insurance companies might be able to reconstruct on a fragmentary basis." *Id.* The need for data developed on a comparable basis for long periods of time is well recognized in insurance. *See* Trieschmann, *Fine Arts: A Changing Market*, 28 CPCU ANNALS, Mar. 1975, at 31.

losses. This statistical function was assumed by the Insurance Services Office around 1971. Class number 331, "Fine Arts—Dealers and Museums," is the classification within which the Insurance Services Office includes data concerning fine arts insurance carried by museums. Thus, data are not segregated between dealers, a generally poor class of risk,[121] and museums.[122]

For the period 1969 to 1973, as shown in Table III, reported written premiums totaled $24,065,792 and paid losses were $7,738,928. The ratio of losses to premiums on a paid-to-written basis was 32.15 percent. These ratios, despite the admixture of dealers' coverage, are regarded as extraordinarily favorable in inland marine insurance.[123] A review of the data over a period of many years reveals that, historically, Class number 331 has had a remarkably low loss ratio.

TABLE III[124]

INLAND MARINE EXPERIENCE BY CLASSIFICATION CLASS #331
FINE ARTS—DEALERS AND MUSEUMS

| Year | Premiums Written | Losses Paid | Loss Ratio |
|---|---|---|---|
| 1973 | 5,743,848 | 1,736,366 | 30.23 |
| 1972 | 5,084,047 | 1,552,725 | 30.54 |
| 1969-73 | 24,065,792 | 7,738,928 | 32.15 |

As reported in 1969,[125] the method of calculating rate level adjustments for inland marine insurance was based on the assumption that the permissible loss ratio should be 57.5 percent of the premium. This assumption allowed 42.5 percent of the premium to be divided as indicated among the following expense and profit factors: (1) commission, brokerage, and other acquisition costs, 25.5 percent; (2) general expense, 7.7 percent; (3) taxes and fees, 3.3 percent; (4) profit and contingencies, 6 percent. The addition of the profit and contingencies

121. "An Interpol official concerned with art cases, André Bossard, reports that the great majority of thefts are from places that lacked adequate anti-theft devices—such as small churches or art dealers' premises; the more valuable and well-known the art work, the more likely it is to be recovered." UNESCO FEATURES 21 (Nos. 679-80, 1975).

122. See note 94 *supra*.

123. In 1974, inland marine insurance loss and loss adjustment ratios for stock insurance companies operating in New York were 62.6%. *See* New York Insurance Dep't, 1974 Loss and Expense Ratios, Dec. 19, 1975 (press release).

124. The data for this table were supplied by the Insurance Services Office. See Letter from Michael D. Ruback, Executive Assistant, ISO, to Irving Pfeffer, Oct. 3, 1975.

125. *See* NEW YORK DEP'T OF INSURANCE, REPORT ON EXAMINATION OF THE INLAND MARINE INSURANCE BUREAU, Jan. 1, 1961 to Dec. 31, 1968, at 139 (1969).

factor results in a basic loss ratio expectation of 63.5 percent. This level of losses has not been approached by museum exhibitions in any year for which records are available.

Fine arts insurance experience for the dealers and museums class, for both the Transportation and Insurance Rating Bureau and, according to its tabulation, the industry as a whole for the calendar years 1972 and 1973, and for the five years ending in 1973, as reflected in Table IV, was more favorable than the averages for all classes of inland marine insurance combined. The dealers and museums class includes most fine arts outside of the private collections classification.

TABLE IV[126]

INLAND MARINE EXPERIENCE BY CLASSIFICATION CLASSES #168 AND #169—DEALERS AND MUSEUMS

| Year | Premiums Written | Losses Paid | Loss Ratio |
|---|---|---|---|
| Reporting Companies | | | |
| 1973 | 43,592 | 7,982 | .183 |
| 1972 | 100,930 | 12,537 | .124 |
| 1969-73 | 350,786 | 94,981 | .271 |
| Total Industry | | | |
| 1973 | 5,787,440 | 1,744,348 | .187 |
| 1972 | 5,184,977 | 1,565,262 | .302 |
| 1969-73 | 27,982,068 | 8,833,909 | .316 |

The Transportation and Insurance Rating Bureau distribution of losses by cause showed theft and mysterious disappearance as accounting for 61 percent of all losses in the class, followed by wind and hail, 10 percent, fire, 5 percent, and burglary and robbery, 4 percent.[127]

Beginning in 1973, under the sponsorship of the Association of Art Museum Directors, the author conducted annual surveys of the insurance experience of art museums.[128] The sample in each case included all museums listed in the *Official Museum Directory*, published by the AAM, under the classification of art museums. The response rate in each of the three years of the survey was very favorable, ranging from 28 percent to 35 percent of the museums sampled. Most of the major museums were accounted for in the surveys.

126. The data comprising this table are found in TIRB CAUSE OF LOSS REPORT, 1969-1973 (1975).

127. Letter from W.D. Weed, General Manager, Transportation Insurance Rating Bureau, to Irving Pfeffer, Sept. 16, 1975.

128. *See Hearings on H.R. 7782, supra* note 6, at 11 (Pfeffer & Uhr article).

The data for special exhibitions, as shown in Table V, reveal loss ratios between 4.2 percent and 17.2 percent for the period 1970 to 1974 inclusive, with an average loss ratio of 11.8 percent.

TABLE V[129]

INSURANCE EXPERIENCE OF ART MUSEUMS
1970-1974

| | 1970 | 1971 | 1972 | 1973 | 1974 | Cumulative |
|---|---|---|---|---|---|---|
| Buildings and Improvements | | | | | | |
| Losses Paid | $ 837 | $ 893 | $ 3,518 | $ 15,200 | $ 5,182 | $ 25,630 |
| Premiums Paid | $ 82,679 | $230,250 | $ 321,329 | $ 323,476 | $ 349,646 | $1,307,380 |
| Loss Ratio | 1.01% | 0.39% | 1.09% | 4.69% | 1.48% | 1.96% |
| Permanent Collections | | | | | | |
| Losses Paid | $ 22,650 | $ 4,275 | $ 10,160 | $ 50,883 | $ 67,132 | $ 155,100 |
| Premiums Paid | $285,400 | $616,299 | $ 341,800 | $ 520,247 | $ 511,965 | $2,275,711 |
| Loss Ratio | 7.94% | 0.69% | 2.97% | 9.78% | 13.11% | 6.82% |
| Loan Collections | | | | | | |
| Losses Paid | $ 2,900 | $ 12,994 | $ 5,860 | $ 20,437 | $ 7,213 | $ 49,404 |
| Premiums Paid | $199,594 | $364,079 | $ 780,580 | $ 207,046 | $ 214,166 | $1,765,465 |
| Loss Ratio | 1.45% | 3.57% | 0.75% | 9.87% | 3.37% | 2.80% |
| Special Exhibitions | | | | | | |
| Losses Paid | $ 35,281 | $ 14,286 | $ 65,752 | $ 72,336 | $ 51,047 | $ 238,702 |
| Premiums Paid | $271,900 | $344,330 | $ 382,019 | $ 455,070 | $ 573,212 | $2,026,531 |
| Loss Ratio | 12.98% | 4.2% | 17.20% | 15.90% | 8.91% | 11.78% |
| Aggregate Results | | | | | | |
| Losses Paid | $ 61,668 | $ 32,448 | $ 85,290 | $ 158,856 | $ 130,574 | $ 468,836 |
| Premiums Paid | $839,573 | $1,554,958 | $1,825,728 | $1,505,839 | $1,648,989 | $7,375,087 |
| Loss Ratio | 7.35% | 2.09% | 4.67% | 10.55% | 7.92% | 6.36% |

As shown in Table II,[130] most insurance claims arising out of special exhibitions tend to be very small. Ninety-three and six tenths percent of the insurance claims were for amounts less than one thousand dollars. In dollar value terms, however, the 93.6 percent of the claims accounted for only 4.1 percent of total insurance payments. This result suggests that deductibles should be considered as a means of lowering insurance costs for handling "nuisance" claims.[131]

The very favorable loss ratios reported in the AAMD surveys were confirmed, in part, by the testimony of several directors of the largest art museums in the United States. One noted, "In the nine exhibitions . . . between 1970 and 1975 with an evaluation of $261,000,000, the

129. The figures for this table are taken from AAMD Survey Data, *supra* note 33.

130. See text accompanying note 38 *supra.*

131. Typical losses included ceramic breakage, water damage to tapestry, glass breakage, fire damage, theft of paintings in transit, glass breakage in exhibition cases, and loss of a drawing in transit.

loss was $750."[132] Another commented, "Our losses have been negligible. The average over the last 10 years has been [$5,000] to $10,000 per year, which is very minute."[133] Yet another remarked, "Losses at the museum in the last 5 years have been less than $2,000."[134] These observations were echoed by the director of the Whitney Museum: "If by 'loss' you mean actual theft or physical loss I think we have had very little at the Whitney Museum. We have had three losses of that sort, three minor matters, minor works, very small works, lost through damage which was covered by deductible."[135]

### International Action on Museum Insurance

Many international organizations have taken steps to reduce the risks to cultural property on special exhibition. The International Council of Museums, through its committee on exhibitions, has appointed working committees to develop standards for intermuseum loan agreements as well as for risk management. The International Council of Museums works very closely with the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the exhibition field.

The executive council of the International Council of Museums adopted an important resolution on June 21, 1973 recommending that UNESCO, "when it considers the exchange of cultural property between nations by means of exhibitions, [urge] other governments to provide programmes of indemnity and guarantee for loans of valuable works of art for major international exhibitions."[136]

In addition, the International Confederation of Dealers in Works of Art has taken action to control the traffic in stolen works of art and has introduced standards for security and loss prevention.[137]

UNESCO's concern over risk prevention and financing for movable cultural property was manifested by conventions and recommendations, adopted in Paris in 1972, regarding the protection of the world's cultural and natural heritage at all levels.[138]

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132. *Hearings on H.R. 7782, supra* note 6, at 43 (testimony of Thomas Hoving).

133. *Id.* (testimony of Richard Oldenberg).

134. *Id.* (testimony of Joseph V. Noble).

135. *Id.* (testimony of Palmer B. Wald).

136. MANUAL, *supra* note 61, at 28.

137. I. Pfeffer, The Technical and Legal Aspects of Risk Prevention and Financing for Movable Cultural Property, 1975, at 4 (unpublished draft in author's file for UNESCO Department of Cultural Heritage).

138. *See* UNESCO, 1 RECORDS OF THE GENERAL CONFERENCE, 17th Sess. 135-54 (1972).

The work of the Committee of Experts on Insurance and Museum Security, convened in Paris in 1974 by UNESCO, is evidence of continuing concern. In its final report, this group responded to a UNESCO resolution "to study practical arrangements which could be adopted nationally and internationally: (i) to reduce the risks to works of art, particularly the risk of theft, and (ii) to reduce the cost of covering such risks . . . ."[139] The committee recommended that

> (a) surveys be conducted on risk management practices among museums and other public and private institutions, large and small, with particular reference to: insurance buying practices, including such questions as centralized responsibility, adequate staffing, procedures, contract analysis, rate analysis, market studies, competitive bidding, annual reports and independent audits; the legal definition of terms and conditions generally used in insurance contracts covering cultural property; the reasonableness of insurance premium rate levels.
>
> (b) surveys be conducted to determine, nationally and internationally, the insurance loss ratio experience of museums, comparing insurance recoveries against insurance premiums paid. . . .
>
> (c) the results of these surveys be circulated.[140]

Several studies under the auspices of UNESCO have dealt with allied problems. Among these reports are the *Preliminary Study of the Technical and Legal Aspects of the Regulation on an International Basis of the Exchange of Original Objects and Specimens Among Institutions in Different Countries*[141] and the *Preliminary Study on the Technical and Legal Aspects of the Regulation on an International Basis of the Safeguarding of Historic Quarters, Towns and Sites and Their Integration into a Modern Environment.*[142]

### Federal Indemnity Approaches

Many countries have responded to the high cost of insurance and the limited budgets of art museums by adopting national programs of governmental indemnity or guarantee for at least a portion of the special exhibition risks. The oldest and best known is the British indemnity scheme. Australia, New Zealand, the Soviet Union, and other countries, including the United States, have employed such indemnity programs as an alternative to commercial insurance.

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139. UNESCO, Final Report of Committee of Experts on Insurance and Other Forms of Coverage of Risks to Works of Art, Aug. 28, 1974, at 1 (SHC.74/CONF.614/7).

140. *Id.* at 3 (citation omitted).

141. 94 UNESCO, Annex, EX/16 (1974).

142. *Id.* at EX/17.

The British program is apparently the oldest of the indemnity plans in general use. By statute, the British government provides that museums may offer indemnities in lieu of commercial insurance to lenders when the purpose of the loan, the eligibility of the borrower, the terms of the agreement and the valuations of the borrowed objects qualify. The agreement is a liberally drafted, brief written contract. It provides:

> If, while the objects are in the [museum or gallery] or in transit to or from it, any of them is, (except as the result of war), lost or destroyed or suffers damage which cannot be fully made good, with the owner's consent by the [museum or gallery], the [museum or gallery] will (the Treasury seeking Parliamentary approval as necessary) make compensation to the owner . . . .[143]

Determinations of eligibility for the indemnity and the resolution of disagreements about the artistic merit of proposed loans are vested ultimately in the British Council and the Arts Council, quasi-independent public bodies.[144]

As reported by George Fox, chief executive officer of the National Gallery in London:

> It has not been found necessary to keep complete records of all claims made under indemnities. It is however clear beyond doubt that the British Government have over the last twenty years or so paid out very substantially less in claims than they would in insurance premiums. The British Government's excellent claims experience in its indemnities scheme can be interpreted either as meaning that considerable premium savings have been made, or that the lack of necessity to find funds for insurance has enabled British institutions to borrow on a wider scale.[145]

The loss ratio under the British government indemnity program during the period 1970 to 1975, with approximately $275 million at risk, was "slightly over one one-hundreth of one percent."[146]

In the United States, legislation has been enacted on a case-by-case basis to provide indemnities for major international exhibitions.[147]

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143. Pfeffer, *supra* note 49, at 124.

144. *See* Letter from George Fox to Paul N. Perrot, Assistant Secretary for Museum Programs, Smithsonian Institution, Sept. 6, 1973.

145. Fox, *The Coverage of Risks of Works of Art*, in RISK MANUAL, *supra* note 61, at 86.

146. *Joint Hearings on S. 1800 Before the Special Subcomm. on Arts and Humanities of the Senate Comm. on Labor and Public Welfare and the Select Subcomm. on Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 41 (1975).

147. *See* Pub. L. No. 93-287, 88 Stat. 143 (1974); Pub. L. No. 93-476, 88 Stat. 1444 (1974).

The exhibition of archaeological materials from the People's Republic of China involved values estimated at $50 million; the exchange of American paintings for Scythian gold and silver objects from the U.S.S.R. was valued at $82 million.[148] The favorable experience with these arrangements, which satisfied the requirements of the lenders and resulted in no material claims, provided a framework for the drafting of legislation which makes such governmental indemnities available on a broader basis.

The indemnity system adopted by the United States under the Arts and Artifacts Indemnity Act[149] is similar to the British scheme except that statutory limits are established for the minimum and maximum liability the government will assume per occurrence and in the aggregate at any time.

Under the terms of the act, the Federal Council on the Arts and Humanities is authorized to make agreements to indemnify items eligible under the act[150] against loss or damage. Eligible items include:

> (1) works of art, including tapestries, paintings, sculpture, folk art, graphics, and craft arts;
>
> (2) manuscripts, rare documents, books, and other printed or published materials;
>
> (3) other artifacts or objects; and
>
> (4) photographs, motion pictures, or audio and video tape which are (A) of educational, cultural, historical, or scientific value, and (B) the exhibition of which is certified by the Secretary of State or his designee as being in the national interest.[151]

The act further empowers the council to enter into a contract with the lender pledging the full faith and credit of the United States to pay any amount for which the council becomes liable under such an agreement.[152] The maximum exposure for the government at any one time for all exhibitions is $250 million.[153] The maximum exposure for any one exhibition is $50 million.[154]

## Conclusion

Museum exhibitions constitute one of the major forces of cultural expression in the United States, with a mass audience which numbers

148. *Hearings on H.R. 7782, supra* note 6, at 11 (testimony of Thomas Hoving).
149. Pub. L. No. 94-158 (Dec. 20, 1975).
150. *Id.* § 2(a).
151. *Id.* § 3(a)(1)-(4).
152. *Id.* § 4(c).
153. *Id.* § 5(b).
154. *Id.* § 5(d).

in the hundreds of millions every year. The cost of mounting major exhibitions is very high and is rising under the pressure of worldwide inflation in the prices of major works of art. Insurance premiums and museum security together account for most of the cost of exhibitions; insurance expenditures alone consume about one-half of the exhibition budgets for large museums. The financial condition of museums in the United States is such that they are unable to fund many of the exhibitions which curators believe have cultural importance. In part, this situation results from exaggerated reports of thefts and other losses incurred by museums. The facts do not support the contention that exhibitions are high risk insurance exposures. Instead, the data clearly indicate that museum risks in the United States have been, and are, highly profitable to the insurance industry at the rate levels which have prevailed for many years. The evidence shows that fine arts insurance rates for museums have been grossly excessive and that, with competition and greater risk management awareness, better terms and conditions can be obtained in the insurance market.

The lack of comprehensive statistics on premiums and losses puts both the insurance underwriters and the museums' registrars, who are primarily responsible for risk management, at a disadvantage. This statistical deficiency has now been recognized, and attempts to overcome it are being made at both the national and the international levels.

For major international exhibitions, the British indemnity scheme provides a model which is being considered by many governments. This plan provides for government indemnity as a substitute for commercial insurance for loans from abroad that are deemed to be of national importance. The American indemnification program is more liberal than the British in that it permits indemnification not only for international borrowing but also for international lending when such lending is part of an exchange of exhibitions.

Reciprocal agreements between major museums in different countries, and between governments, are an important means of reducing the costs for international exhibitions of objects of great value and cultural significance.